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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-693

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, the Honorable Hubert L. Will, Judge, United States District Court for the Northern District of Illinois, by his counsel, prays that a writ of certiorari issue to review the issuance of a writ of mandamus by the United States Court of Appeals for the Seventh Circuit on August 15, 1977, and that, summarily or upon hearing, the issuance of the writ of mandamus be reversed.

Opinion Below

The opinion of the court of appeals (Appendix 1) is reported at 560 F.2d 792.

Jurisdiction

The writ of mandamus was issued by the court of appeals on August 15, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the district courts of the United States have been deprived by this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), of all discretion to stay proceedings pending before them in the interest of judicial economy and to avoid duplicative litigation.

2. Whether the United States district courts have a clear legal duty enforceable by mandamus "immediately" to try cases before them despite the fact that prior-commenced litigation between the same parties raising the same legal and factual issues is proceeding in a state court in a manner that may well render the entire federal case moot.

3. Whether this Court's opinion in *Colorado River* entitles a litigant effectively to compel a United States district judge by writ of mandamus to engage in a race with a state court to decide identical legal issues pending in both courts between the same parties, when the judge reasonably believes such a race to be unnecessary and wasteful.

Statutory Provision Involved

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Facts

The recitation of facts is selected from the opinion below substantially in that court's own language.[1]

Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool."

Calvert [became] a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials. In April 1974, Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool. Calvert notified American Mutual that it intended to rescind its agreement to participate in the pool. Litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert*	*Calvert* v. *American Mutual*
Circuit Court of Cook County, Illinois	United States District Court for the Northern District of Illinois
July 3, 1974	
American Mutual sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.[2]	

[1] Additions are listed in brackets; deletions are not indicated.
[2] The complaint without exhibits is attached as Appendix 3.

January 10, 1975

Calvert filed an answer alleging that the agreement was void because American Mutual violated [Section 5 of] the 1933 Securities Act, [Rule 10b-5 promulgated under] the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.

January 10, 1975

Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds [state and federal] as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as [damages] for alleged violations of Rule 10b-5 of the Securities Exchange Act. [4]

With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act. [3]

Judge Will stayed proceedings in the case before him pending the outcome of the state proceedings listed above. The court of

[3] The answer and counterclaim is attached as Appendix 4.

[4] The federal complaint without exhibits is attached as Appendix 5.

appeals issued a writ of mandamus compelling him "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934."

Judge Will's Opinion

On May 6, 1975 Judge Will issued the memorandum opinion and order at issue here. The order stayed proceedings in the federal courts on all claims alleged in Calvert's complaint, except the claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The opinion and order are attached as Appendix 2. The result has been to postpone all adjudication in federal court pending the outcome of the state proceedings.

Judge Will's May 6, 1975 opinion is a careful exposition of the applicable standards governing a decision to stay and a detailed analysis of the reasons why a stay should be issued in the present case.

Judge Will, in the exercise of his judicial discretion, determined that retaining jurisdiction over Calvert's federal claims, but awaiting further developments in the state litigation before rendering a decision, was appropriate and that "in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative."

He continued: "The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the

1934 Act monetary damages question, but it also includes those issues underlying [American Mutual's] declaratory judgment action which are not present here. Accepting the fact that the state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna* [*State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970)], we find that Calvert's federal suit should be stayed pending disposition of the state court suit."

Judge Will also noted the need to avoid an "unseemly race to judgment with its concomitant harrassment and confusion." He concluded: "To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts."

He further noted: "While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here."

After attempts to secure reconsideration, Calvert petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus.

Opinion of the Court Below

Mandamus was granted by the court of appeals, relying exclusively on this Court's opinion in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). The court of appeals made clear that Judge Will's action had been entirely "correct" under existing Seventh Circuit law as

stated in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970), but held that the discretionary doctrine of *Aetna* had been overruled by *Colorado River*.

The opinion below states:

"The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction." 560 F.2d at 793.[5]

The court stated that under the existing Seventh Circuit rule of *Aetna State Bank* v. *Altheimer, supra*, which recognized "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," 430 F.2d at 755, Judge Will's stay order "was correct at the time it was entered," in May 1975. 560 F.2d at 795.

The court of appeals held, however, that the subsequent decision of this Court in *Colorado River Water Conservation District* v. *United States, supra*, overruled the *Aetna State Bank* case, eliminated the power of a district court to control its

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[5] The sole difference between the claims in the state court and the federal court relates to the allegations concerning Rule 10b-5 under the Securities Exchange Act of 1934.

In the state court, fraudulent representations in violation of Rule 10b-5 are alleged as a defense to the complaint, but no affirmative damages for violation of Rule 10b-5 are claimed. Instead, a two million dollar counterclaim for damages is based exclusively on supposed violations of other state and federal laws. In the federal court, a claim for two million dollars in damages is also alleged, based upon violation of Rule 10b-5 in addition to the other state and federal grounds alleged as bases for the two million dollars damages in the state court.

Accordingly, all issues relating to liability, including Rule 10b-5, are presented in the state court action, the only issue presented exclusively in the federal court being the extent of damages in the event liability under Rule 10b-5 is found to exist.

docket, and compelled the district court to undertake immediately its "obligation to exercise its jurisdiction." 560 F.2d at 795-97.

On the basis of this view, the court of appeals panel granted a writ of mandamus and ordered Judge Will as noted "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934." *Id.* at 797.

Four of the eight active judges on the court of appeals indicated a desire to have the matter submitted to the court *en banc*. Their views are set forth in note 5 to the opinion below. They said: "In simple terms, the panel's opinion holds that the rationale developed in *Aetna* [*State Bank* v. *Altheimer*] can no longer stand in the light of *Colorado River*. . . ." They stated: "the panel has apparently taken from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " a power these four judges believed to be based on this Court's opinion in *Landis* v. *North American Co.*, 299 U.S. 248 (1936). They regarded the rule of *Landis* and *Aetna* which the panel was abandoning as "a salutary rationale in the context of the overburdened federal courts." 560 F.2d at 796 n.5.

By granting the writ of mandamus, the panel held that the district court had a clear legal duty to proceed regardless of the pendency of the state proceeding, and accordingly had no discretion in the matter. For it is plain that mandamus as an extraordinary remedy will not lie with respect to the exercise of discretion, but only where the duty is not subject to discretion. It is available only in "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will* v. *United States*, 389 U.S. 90, 95 (1967).

Thus, the sole issue raised is whether a United States district judge has *any* discretion to stay proceedings in his court

when the identical parties are litigating the identical issues in a previously pending case in a state court. As noted, the court of appeals agreed that, if Judge Will had any discretion over his calendar, his decision to stay proceedings was "correct." Nevertheless, following what it believed to be the implications of the Court's decision in *Colorado River Water Conservation District* v. *United States, supra,* the court of appeals denied him any discretion and granted a writ of mandamus to compel him to reorder his calendar and immediately decide issues that otherwise might well become moot as a result of the pending state court litigation.

This Court's *Colorado River* Decision

The instant case is thus concerned exclusively with an interpretation given by the court of appeals to this Court's opinion in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). The opinion below expressly found that *Colorado River* overruled the discretionary power of federal district judges to stay proceedings in their courtrooms, a power heretofore recognized in *Aetna State Bank* as derived from *Landis* v. *North American Co.* However *Colorado River* concerned not a stay of proceedings, a mere postponement of judicial decision, but a final dismissal of a case within the jurisdiction of a federal court in favor of ongoing parallel state litigation.

In *Colorado River,* the United States had brought suit in federal court in its own behalf and on behalf of Indian tribes, seeking a declaration of water rights in the Colorado watershed. The district court dismissed the action, stating that the doctrine of abstention required deference to a comprehensive adjudication of water rights pending in a Colorado state court. 424 U.S. at 806. It was noted that federal policy as embodied in the McCarran Amendment, 43 U.S.C. § 666, opposed piecemeal adjudication of water rights, that the federal government was already involved in a number of other Colorado state water

rights adjudications, that no substantive proceedings had taken place in federal court, and that the federal courthouse was 300 miles from the water sources at issue. 424 U.S. at 820.

This Court held that, while the district court had improperly applied the abstention doctrine, it had acted properly in dismissing the federal action as a result of the balancing of a number of factors: While there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, dismissal is appropriate in "exceptional circumstances." The court concluded that:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942), and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v. *North American Co., supra*, at 254-255. Only the clearest of justifications will warrant dismissal." 424 U.S. at 818-19.

All the justices accepted this standard; the majority held that a balancing of these factors favored dismissing the federal court litigation, while three dissenters felt that the prerogative of district courts to dismiss actions should be more limited. No question was raised and no consideration was given by any of the justices, majority or minority, to the power of district judges to control the calendar of cases, and to stay federal proceedings without dismissing the case. Accordingly, no express statement was made concerning the rights of district courts to exercise the

inherent right to control their calendars in the interests of judicial economy and avoidance of duplicative litigation, where no order of dismissal is entered and jurisdiction is retained.

The panel below, however, stated that it saw no distinction between a stay and a dismissal. Applying the high standards required for dismissal by *Colorado River, i.e.*, exceptional circumstances, the panel below held that the standards had not been met and that no right to dismiss existed; therefore in its view no stay was permissable, the discretion to stay being limited to situations where dismissal was appropriate.

The *Colorado River* case having come before the appellate courts by appeal from a dismissal, no question either of the power to stay or of the use of the extraordinary writ of mandamus was involved, and there was no occasion for any discussion of those subjects.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. **Importance of the question.**

(a) The decision below fundamentally and grievously misconstrued this Court's opinon in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), with important adverse consequences to the fair and prompt administration of justice. The Seventh Circuit, in issuing a writ of mandamus directing Judge Will to decide "immediately" the issues in the case, denied the existence of any discretion by a district judge to stay a proceeding before him pending trial of the same issues between the same parties by a state court.

This is emphasized by the fact that the Seventh Circuit expressly stated that, under its earlier decisions acknowledging the existence of discretion, Judge Will's exercise of such discretion here would have been "correct."

The Seventh Circuit, in abandoning its own precedent and a consistent line of cases in this Court, relied exclusively on this

Court's decision in *Colorado River*. This Court in *Colorado River*, however, plainly did not intend to remove the discretionary powers of district judges to stay proceedings. In *Colorado River*, as shown above, the Court laid down standards under which a district judge may dismiss a case where related issues are in litigation in a state court. It did not deal with the district court's power to stay as distinct from its power to dismiss proceedings.

As four of the eight active judges of the Seventh Circuit Court of Appeals recognized in declaring their opposition to the panel's grant of mandamus, it is "difficult to think that the *Colorado River* language that '[o]nly the clearest of justification will warrant dismissal,' 424 U.S. at 819, and the other repeated references to dismissal, overlooked the technical, but significant, differences between a stay of proceedings and a dismissal." 560 F.2d at 796 n.5.

Moreover, even the standards the Court established in *Colorado River* for dismissal of an action clearly involve a discretionary authority on the part of the district judge. There is no indication that this Court's decision in *Colorado River* contemplated the removal of discretion and the propriety of a writ of mandamus even in the dismissal of actions in federal courts while similar actions are pending in state courts, much less in the stay of such actions.

(b) If the decision below is allowed to stand, *Colorado River* will have precisely the opposite effect to that clearly intended by this Court. Instead of sustaining the authority of district judges to avoid duplicative litigation, it will exterminate that authority.

As will be demonstrated below, this complete misreading of *Colorado River* will immediately affect severely the conduct of business in federal district courts in every part of the country. By denying district judges the authority to organize their dockets and schedule their judicial business in the most efficient and equitable manner, it will arm litigants with a simple

expedient for obtaining two trials and perhaps appeals of every federal claim, further burdening an already overburdened federal judiciary.

Unless this Court resolves the matter now, every United States district court and court of appeals may soon be confronted by litigants seeking the same opportunity to have their claims decided simultaneously by state and federal courts.

This Court should grant certiorari in the exercise of its power of supervision "because of the wide implications of the decision below for the orderly administration of . . . justice in the federal courts." *Will* v. *United States*, 389 U.S. 90, 95 (1967).

It has long been an underlying tenet of judicial administration that

> "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936).

This principle of *Landis* v. *North American Co.* has been followed for forty years without criticism. It was recently cited with approval by this Court in *Colorado River Water Conservation District* v. *United States, supra*, 424 U.S. at 817-19.

Colorado River did not purport to limit or question *Landis* v. *North American Co.* Indeed, the apparent holding of *Colorado River* was to extend the discretionary balancing doctrine of *Landis* in a limited class of cases beyond the context of stay orders to final dismissals.

Nevertheless, the panel of the Seventh Circuit Court of Appeals, without even the support of a majority of that court,

has interpreted *Colorado River* as overruling *Landis* v. *North American Co.*, and, as four members of the court below stated, "tak[ing] from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " 560 F.2d at 796 n.5 (emphasis in original).[6]

Under this interpretation, if a litigant brings identical claims in state and federal courts, so long as the federal claim is colorable, the federal court has no discretion to stay proceedings. Indeed, mandamus will lie to compel the district court to decide pending issues "immediately," even though those issues might be rendered entirely moot by state court proceedings already in a more advanced stage.

As indicated above, Judge Will's decision in the instant case involved only timing. He simply postponed decision of Rule 10b-5 issues, because of the possibility or even probability that the litigation in his court would become entirely moot as a result of the earlier filed parallel litigation being conducted in state court. He retained jurisdiction over all of Calvert's claims, and issued only a temporary stay. Calvert has not been denied its right to a federal forum.

If at some point Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, or if at the end of state court litigation Calvert's Rule 10b-5 claim had not become moot, Judge Will would then decide all issues before him in the light of wisdom gained from the state court proceedings. In the interim, he would be able to devote his resources to the claims of other litigants who have no alternate state court case through which to seek identical relief.

Indeed, the instant litigation presents a far stronger case for a stay than did *Landis* v. *North American Co.* In *Landis*, the

[6] The court of appeals did not address itself to the question of how a clear legal duty, enforceable by mandamus, could exist when the panel's construction of *Colorado River* was unable to attract the support of even a bare majority of the Seventh Circuit judges.

Court permitted a district court to stay proceedings pending the outcome of a case between *different* parties because it raised similar legal questions. In no event could the stayed litigation have been rendered moot as a result of the other case. But in the instant situation, the parties and the claims in the two cases are identical, all factual and legal issues raised in the two cases are identical, and the state court has authority to grant all requested relief, thereby creating a strong possibility that the federal case will ultimately be rendered moot.

Because the instant litigation presents an even clearer case for a stay than did *Landis*, the impact of the Seventh Circuit's misreading of *Colorado River* will be that much greater. The pendency of these identical lawsuits in state and federal courts was solely the result of Calvert's litigation strategy. It chose neither to remove the state litigation to federal court, nor to allow the state case to proceed to a conclusion first. By the simple expedient of filing two suits, it has endeavored to obtain two trials. Many other litigants with federal claims will be able to do the same. District judges will have no discretion to order their calendars to promote efficiency, but will be compelled "immediately" to decide issues already pending in state courts.

Rather than discouraging duplicative litigation, as this Court desired in *Colorado River*, the Seventh Circuit has guaranteed litigants two trials of any federal claim through the simple expedient of suing simultaneously in state and federal courts. This result was perceived by the court of appeals as the express command of this Court's *Colorado River* decision. Hence, the impact of the decision below will not be limited to district judges in the Seventh Circuit. Litigants throughout the United States will file suits simultaneously or successively in state and federal courts, and will cite *Colorado River* and the decision below as entitling them to two trials. Every United States court of appeals will soon be petitioned to issue writs of mandamus to enforce that entitlement. The result will be either a widening split among the courts of appeals, or further encouragement of dual litigation.

The impact on the district courts will be devastating. The reasonable discretion permitted by *Landis* v. *North American Co.* and extended by *Colorado River* has never been more essential than it is today. This Court is well aware of the current crisis resulting from the ever increasing caseload of the federal courts. In 1976, over 130,000 civil actions were commenced in the United States district courts, an increase of more than 11 percent over 1975. The Annual Report of the Director of the Administrative Office of the United States Courts 173 (1976). On June 30, 1976, over 4,000 civil actions were pending before the eleven judges in Judge Will's district, the Northern District of Illinois. *Id.* at 291.[7] There simply is not time for duplicate federal rulings on issues actively being litigated in state courts.

For example, in the present case, two Illinois courts, the Circuit Court of Cook County and the Illinois Appellate Court, have held that no security is involved in the reinsurance pool arrangement, and discretionary review is being sought from the Supreme Court of Illinois. Calvert is here seeking the view of Judge Will on this same point which, if unsatisfactory to it, will be brought to a fifth court, the Seventh Circuit, and then perhaps by both routes to this Court. This legal question has so dominated the litigation to date that neither party seems to have directed any attention to the issue on the merits whether Calvert was in fact, as alleged, misled when it entered the reinsurance pool.

[7] That district is currently operating with two fewer judges than the number now authorized by statute; legislation pending before Congress would add three more district judgeships. In the meantime, Judge Will's statistics reveal that he is busier than at any other time in his sixteen-year judicial career. Currently, 404 cases are pending before him. Ten years ago, his docket had been as low as 89 cases. Judge Will, today, is disposing of one and one-half times as many cases as in earlier years, forty or more per month, yet the backlog is growing.

This Court has recently made very clear that Rule 10b-5 must not be allowed to become a source of "vexatious litigation," federalizing state controversies and overriding state policies. *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 479 (1977); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 740 (1975). Yet the opinion below would encourage bringing vexatious Rule 10b-5 litigation simultaneously in two court systems to secure two adjudications.

Last month, in *General Atomic Co.* v. *Felter,* 46 U.S.L.W. 3289 (U.S. 1977), this Court reaffirmed summarily that state courts were without power to enjoin "vexatious and harassing" duplicative litigation in federal courts. This Court considered litigants to be protected, however, because "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment." *Id.* at 3291. Yet the opinion of the Seventh Circuit in the instant case would deny district courts that capability to control proceedings to prevent harassment and abuse. Indeed, the decision below would increase the likelihood of harassing duplicative litigation by compelling the federal district courts to decide "immediately" issues already being adjudicated in state courts. The obvious consequences to the proper administration of justice are so clearly adverse that prompt reversal is necessary.

Moreover, the Seventh Circuit's construction of *Colorado River* would fundamentally alter the relationship between the federal circuit and district courts, forcing the courts of appeals to become petty functionaries issuing extraordinary writs to control the docket and day-to-day schedules of district judges. Circuit judges have neither the authority, the experience, nor the resources to perform this task. The proper role of the courts of appeals has traditionally been to review the decisions of district courts for errors of law. 28 U.S.C. §§ 1291-94; *see, e.g.,*

Application of Edwards, 375 F.2d 108, 108 (2d Cir. 1967) (mandamus denied; "Courts of Appeals must stay within the appellate function assigned to them").[8]

It should be noted that the opinion below did not limit itself to Rule 10b-5 claims, over which federal courts have exclusive jurisdiction; its construction of *Colorado River* would force a district judge to decide immediately all issues in a federal case pending simultaneously in a state court.[9] Despite a district judge's admittedly correct decision about the fairest and most efficient way to order his docket, the court of appeals felt compelled by this Court's decision in *Colorado River* to use its mandamus power to determine in what order, and according to what schedule, cases should be heard and decided in the district court. *Cf. In re Josephson*, 218 F.2d 174, 177 (1st Cir. 1954) ("Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts"), *quoted, La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 267 (1957) (Brennan, J., dissenting).

Besides its serious impact, already noted, on district judges, this new responsibility would impose a significant new burden on the already overworked courts of appeals. In addition to more mandamus proceedings, the decision below will inevitably generate a whole new body of additional appeals from

[8] There have, of course, been particular instances of gross dereliction of duty by district judges which required the courts of appeals to exercise supervisory jurisdiction. *See, e.g., Natural Resources, Inc.* v. *Wineberg*, 349 F.2d 685, 692 (9th Cir. 1965) (district judge failed to render a decision on the "relatively simple" central issue of a lawsuit for more than four years; a "shocking situation"), *cert. denied*, 382 U.S. 1010 (1966). However, the opinion below has gone far beyond this limited supervisory jurisdiction. It has ruled that mandamus would issue despite the fact that Judge Will had exercised his discretion correctly.

[9] *See* 560 F.2d at 797 n. 6.

district court rulings on matters already decided by state courts. Yet the backlog of cases in the courts of appeals has also recently "skyrocketed." The Annual Report of the Administrative Office of the United States Courts 152-66 (1976). On June 30, 1976, over 14,000 appeals were pending. *Id.*

In short, as interpreted in the opinion below, this Court's decision in *Colorado River* would make sweeping changes in the structure of the federal judiciary and the conduct of judicial business. Such extreme consequences should not result from an erroneous interpretation of a Supreme Court decision by a court of appeals. We submit that the decision below, based solely on *Colorado River*, was so plainly erroneous, that this Court might reasonably decide to reverse summarily without full briefing or argument.

If in fact however it was the Court's intention to overrule *Landis* v. *North American Co.*, it should now do so clearly and expressly to proclaim this revolutionary new doctrine as the law for all inferior courts. As this Court noted once before, "[i]n such circumstances the call is plain for a decision that will mark with greater clearness the bounds of power and discretion. . . . [Certiorari should be] granted . . . that this result might be attained." *Landis* v. *North American Co., supra*, 299 U.S. at 254.

2. **Conflict among the circuits.**

In granting a writ of mandamus compelling Judge Will to decide "immediately" issues pending simultaneously in an earlier commenced action in a state court, the United States Court of Appeals for the Seventh Circuit "has rendered a decision in conflict with the decision of another court of appeals on the same matter," Sup. Ct. R. 19.1(b). Indeed, the law of the Seventh Circuit is now in potential conflict with that of at least two other federal judicial circuits. It is well-established in the Ninth Circuit that a federal court may exercise its discretion to grant a stay of proceedings when a case is pending in state court between the same parties in which the state court has

jurisdiction to decide all legal issues. *Lear Siegler, Inc.* v. *Adkins*, 330 F.2d 595 (9th Cir. 1964); *see Lecor, Inc.* v. *United States District Court for the Central District of California*, 502 F.2d 104, 105 (9th Cir. 1974). The Sixth Circuit Court of Appeals has held that mandamus does not lie to command a district judge to dissolve a stay order. *Jewell* v. *Davies*, 192 F.2d 670 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952). To be sure, these decisions predate this Court's *Colorado River* opinion. Nevertheless, they must be assumed to reflect current practice in the Ninth and Sixth Circuits. Unless the judges of these courts adopt the extraordinary construction of *Colorado River* followed by the court below, a construction that was unable to attract the support of a majority of the Seventh Circuit judges,[10] there will be an open conflict among the judicial circuits. Under traditional principles, a writ of certiorari should be granted to enable the Court to resolve these conflicts.

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[10] Indeed, because the eight active judges of the Seventh Circuit divided evenly on the correctness of the opinion below, there exists a critical conflict not only among the circuits, but within the Seventh Circuit itself, that can be resolved only if certiorari is granted.

CONCLUSION

For the reasons stated, the writ of certiorari should be granted and the writ of mandamus vacated. Allowing the writ of mandamus to stand threatens conflict among the circuits and confusion as to the meaning of this Court's ruling in the *Colorado River* case. Without clarification from this Court, *Colorado River* will be understood by an undeterminable number of lower courts as by the Seventh Circuit as a reversal of the essential discretion exercised for many years by trial judges in the control of their own calendars in the interest of a fair and efficient administration of justice. The resulting confusion would further burden the already overburdened federal courts. Prompt clarification is urgently required from this Court.

Summary reversal with a brief reaffirmance of *Landis* v. *North American Co.* is respectfully suggested as appropriate.

Respectfully submitted,

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Dated: November 14, 1977

APPENDIX I

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 76-1495
CALVERT FIRE INSURANCE COMPANY,

Plaintiff-Petitioner,

v.

HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Defendant-Respondent.

On Petition for Writ of Mandamus.
No. 75 C 103—Hubert L. Will, *Judge*

ARGUED SEPTEMBER 16, 1976—DECIDED AUGUST 15, 1977

Before SWYGERT and WOOD, *Circuit Judges,* and GRANT, *Senior District Judge.*[1]

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[1] The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana is sitting by designation.

SWYGERT, *Circuit Judge*. The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction. The question forms the basis for a petition for a writ of mandamus against United States District Judge Hubert L. Will of the Northern District of Illinois. We grant the writ.

Plaintiff-petitioner Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool." Fire and casualty policies underwritten by primary insurance companies are reinsured by American Mutual which in turn lessens its reinsurance risks by enlisting other insurance companies to enter into a pool arrangement. These companies earn a pro rata share of the excess of American Mutual's premiums over the sum of losses paid primary insurers and a management fee. If losses exceed premiums the pool members are obligated to indemnify American Mutual.

Calvert is a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials during which Calvert asserts it sought financial data from American Mutual. Although apparently available, the data was not furnished. In March 1974 Calvert received from American Mutual its first statement which reflected extremely high reserves for incurred but not reported losses for the months of January and February 1974. In April American Mutual's 1973 annual report showed an inordinately high loss and expense ratio. Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool because of American Mutual's withholding of material information during the negotiation of the agreement. Calvert notified American Mutual that it intended to rescind its agreement to

participate in the pool. Simultaneous litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert* Circuit Court of Cook County, Illinois	*Calvert* v. *American Mutual* United States District Court for the Northern District of Illinois
July 3, 1974 American Mutual sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.	
January 10, 1975 Calvert filed an answer alleging that the agreement was void because American Mutual violated the 1933 Securities Act, the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.	January 10, 1975 Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as for alleged violations of Rule 10b-5 of the Securities Exchange Act.
With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act.	

On February 5, 1975 American Mutual moved to abate or, in the alternative, to dismiss the federal court action. The

abatement motion was based on the fact that six months previously American Mutual had initiated its declaratory judgment action in the Circuit Court of Cook County. The motion to dismiss was based on American Mutual's contention that the reinsurance contract executed by the parties did not constitute a sale by American Mutual of a security under either the Securities Act of 1933 or the Securities Exchange Act of 1934.

On May 6, 1975 Judge Will issued a memorandum opinion and order on American Mutual's motion to abate. The order stayed all claims alleged in Calvert's complaint, except its claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The district court's jurisdiction over the latter claim was specifically retained by the terms of the order. On May 9, 1975 Judge Will heard oral argument on the primary issue underlying the claim for damages: whether a participatory interest in the reinsurance pool is a security? The judge has not ruled on this issue.

On June 16, 1975 the judge in the state court declaratory judgment action ruled that participatory interests in the reinsurance pool are not securities and that application of the federal securities laws was barred by the McCarren-Ferguson Act, 15 U.S.C. §1101-05. Calvert appealed from this ruling to the Illinois Appellate Court, which affirmed the trial court's decision.

On two occasions subsequent to the abatement order Calvert requested the district judge to reconsider his order. He refused the requests, and also refused to rule on the claim for damages under Rule 10b-5 over which he retained jurisdiction. He has declined to permit interlocutory review of his order.

Calvert recognizes that the district court's order staying proceedings on most of Calvert's federal complaint is not appealable because it is not a final order. *See Cotler* v. *Inter-County Orthopaedic Ass'n, P.A.*, 526 F.2d 537, 540 (3d Cir. 1975). It therefore seeks review of the district court's action by petitioning for a writ of mandamus. In its petition it asks us to

require Judge Will to adjudicate its entire claim—both for equitable relief and for damages—under the Securities Exchange Act of 1934.[2] Calvert is therefore partially seeking reversal of the district court's decision to stay Calvert's claim for equitable relief and partially seeking an order compelling Judge Will to immediately decide the claim for damages over which he has retained jurisdiction.[3]

I

A writ of mandamus is an extraordinary remedy which we will not easily grant. In a fairly recent case, *Will* v. *United States*, 389 U.S. 90, 96 (1967), the Supreme Court advised the lower federal courts: "[t]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is clear and indisputable'" (citation omitted). With these preliminary observations in mind, we turn to the merits of the petition.

II

The district court relied principally upon this court's decision in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970). In *Aetna* the district court stayed an action brought under Rule 10b-5 in deference to state court proceedings involving the same transaction in which the identical Rule 10b-5 claim was raised as an affirmative defense. We sustained the district court's action, holding that the stay was a proper exercise of "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." 430 F.2d at 755.

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[2] The petition does not mention the claims for equitable and monetary relief under the Securities Act of 1933 or state law contained in Calvert's federal complaint.

[3] Calvert's position is that: "Although Judge Will's Opinion states that Calvert's Rule 10b-5 claim is 'viable,' his subsequent rulings have, in effect, stayed that claim as well."

The district court's reliance on *Aetna* was not misplaced. Although Calvert struggles to distinguish the case at bar from *Aetna*, the factual parallelism between the two cases is overwhelming. Thus, the district court's order was correct at the time it was entered.

Since that time, however, the Supreme Court has decided *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), in which it thoroughly analyzed the law with respect to contemporaneous exercise of concurrent jurisdiction by state and federal courts. If *Colorado River* controls the instant case, we must apply it even though it was decided after the district court had acted. *United States* v. *Fitzgerald*, 545 F.2d 578, 581-82 (7th Cir. 1976).

In *Colorado River* the Supreme Court stated that, in cases of contemporaneous exercise of concurrent jurisdiction by a state court and a federal court, the federal court generally has an obligation to exercise its jurisdiction. The Court reaffirmed the rule of *McClellan* v. *Carland*, 217 U.S. 268 (1910), that the pendency of a state court action is not a bar to an action in a federal court involving the same issues. It held that only in exceptional circumstances should a federal court dismiss an action because of the pendency of state proceedings involving the same issues. Circumstances which might lead to such a dismissal include: (1) the assumption of jurisdiction over a *res* by the state court; (2) the desirability of avoiding piecemeal litigation; (3) the inconvenience of the federal forum; and (4) the order in which concurrent jurisdiction was obtained by the two forums. None of these factors alone is determinative and "[o]nly the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 819.

After making it clear that only exceptional circumstances would ever warrant deference to a state court in cases of concurrent state and federal jurisdiction, the Court found such circumstances in *Colorado River*. In that case the United States brought an action in federal court asserting water right claims.

One of the defendants attempted to make the United States a party to a state action in order to adjudicate all of the Government's claims. The most important factor warranting dismissal of the federal action was the existence of the McCarran Amendment, 43 U.S.C. § 666, providing for consent to join the United States in a state suit for adjudication or administration of water rights. The federal policy evinced by that amendment was one of avoiding piecemeal litigation and the disruption of a complicated and extensive system of state allocation and adjudication of water rights, such as the one employed by the State of Colorado.

The instant case differs from *Colorado River* in that the district court did not dismiss Calvert's federal action. Instead, it stayed[4] all but the claim for damages under Rule 10b-5, over which it retained jurisdiction but refused to decide. We do not find this distinction to be important. It is clear that the district court, acting properly under *Aetna*, intended to defer on grounds of federalism to the result reached in the state proceedings. Thus, the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case. We therefore hold that *Colorado River* is applicable and turn to a determination of whether the exceptional circumstances which *Colorado River* requires in order to justify federal deference to state proceedings are present.

We do not find any exceptional circumstances in the instant case. The federal forum was not inconvenient for the

[4] The district court granted American Mutual's motion to "abate," but stated specifically that it was "staying" all but the Rule 10b-5 damages claim. In *Aetna*, we defined abatement "as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way." 430 F.2d at 754. We assume that Judge Will meant to use "stay" as a synonym for "abate."

parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings.

The rationale developed in *Aetna* can no longer stand in light of the Supreme Court's decision in *Colorado River*. *Aetna* therefore is overruled as the law of this circuit.[5]

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[5] This opinion has been circulated among all judges in regular active service. A majority of the judges did not favor rehearing *en banc* on the question of overruling *Aetna*.

Circuit Judge Pell, however, filed the following statement in which Chief Judge Fairchild and Circuit Judges Tone and Bauer joined:

The panel's opinion in this case was circulated to all judges of the court in regular active service. Four of the eight judges voted to rehear the case *en banc* insofar as it overruled *Aetna State Bank* v. *Altheimer*, 430 F.2d 750 (7th Cir. 1970). In simple terms, the panel's opinion holds that the rationale developed in *Aetna* can no longer stand in the light of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). In overruling *Aetna*, as opposed to finding that that case was good law but that the district court had abused its discretion in granting a stay of the federal litigation, the panel has apparently taken from the district court the *power* to stay proceedings as "incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants." *Aetna*, 430 F.2d at 755. Under *Aetna*, "[h]ow this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Id.*

These principles announced in *Aetna* were not particularly new. The foregoing extracts from *Aetna* relied upon *Landis* v.

North American Co., 299 U.S. 248 (1936), which case ironically, is cited in *Colorado River*, 424 U.S. at 818-19, for much the same proposition. Indeed, the matter of a federal stay when a similar action between the same parties is pending in a state court is not itself a new problem. See the extensive 136 page Annotation, Stay of Action in Federal Court Until Determination of Similar Action Pending in State Court, 5 ALR Fed. 10 (1970).

It would seem that the judicial demise of the rationale of *Aetna*, a salutary rationale in the context of the overburdened federal courts, would warrant *en banc* reconsideration at the very least, bearing in mind that during the seven years of *Aetna's* viability it has been followed and relied upon here and elsewhere and that its application would at most assume the form of a discretionary stay and not a dismissal as in *Colorado River*. In that case, of course, the Court upheld the dismissal of the federal action.

It is difficult to think that the *Colorado River* language that "[o]nly the clearest of justification will warrant dismissal," 424 U.S. at 819, and the other repeated references to dismissal, overlooked the technical, but significant, differences between a stay of proceedings and a dismissal. In applying *Aetna*, this court has made it clear that "a stay of the federal proceedings is the appropriate response rather than a dismissal of the complaint." *Weber* v. *Consumers Digest, Inc.*, 440 F.2d 729, 732 (7th Cir. 1971).

Unfortunately for the continued availability to district court judges of the *Aetna* concept of the weighing of competing interests, the posture of the case before the *Calvert* panel, that of a petition for mandamus, precluded a review of the discretionary stay granted below. The *Calvert* panel unnecessarily, it would appear, found itself in the Hobson's choice position because of its agreement with the petitioner that the stay order was not appealable. The result, however, is inconsistent with prior authority in this circuit to the effect that there is appellate jurisdiction for review of stay orders, *Drexler* v. *Southwest DuBois School Corporation*, 504 F.2d 836, 838 (7th Cir. 1974) (en banc); *accord*, *Vickers* v. *Trainor*, 546 F.2d 739, 741 (7th Cir. 1976), neither of which the panel adverted to nor purported to overrule. See also Note, *Appealability of Abstention Orders*, 10 Ind. L. Rev. 556, 565 (1977). It would seem to be a matter of regret that the important issue here involved was resolved in the context of allowing the extraordinary writ of mandamus to serve as a substitute for an appeal.

We conclude that the district court should neither have delayed the adjudication of Calvert's Rule 10b-5 claim for damages nor stayed Calvert's other federal claims. Accordingly, we grant the writ of mandamus and order the district court to proceed immediately with Calvert's claim for damages and equitable relief under the Securities Exchange Act of 1934.[6] We need not decide whether the state proceedings between Calvert and American Mutual, if they are now concluded, would be *res judicata* as to those portions of Calvert's federal complaint which the district court had stayed and which we are now ordering it to reinstate. Nor need we reach the difficult issue of whether the conclusion of the state proceedings would have a collateral estoppel effect on the Rule 10b-5 claim for damages over which the court had retained jurisdiction but declined to resolve. What we are deciding is that the district court should not have deferred to the state court on grounds of federalism in light of *Colorado River*.

The petition for a writ of mandamus is granted and the writ shall issue forthwith.

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[6] As we have already noted, Calvert's petition did not refer to its claim under the Securities Act of 1933 which the district court had stayed. *See* note 2 *supra*. The logic behind our holding in this case supports the conclusion that the stay of 1933 Act claims, as well as the 1934 Act claims, was improper. Although we will not order the district court to immediately decide the 1933 Act claims because the issue is not before us, the district court should consider revoking the stay of the 1933 Act claims if Calvert moves for such relief.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

v.

AMERICAN MUTUAL REINSURANCE CORPORATION, an Illinois corporation,
Defendant.

75 C 103

MEMORANDUM OPINION

The plaintiff, Calvert Fire Insurance Company (Calvert), brings this action against American Mutual Reinsurance Corporation (Amerco), seeking rescission of a reinsurance pool agreement, or, in the alternative, monetary damages, for alleged violations of (1) section 12(1) of the Securities Act of 1933; (2) section 10(b) of the Securities and Exchange Act of 1934; (3) section 137.12(G) of the Illinois Security Law; (4) section 34(a)(2) of the Maryland Securities Act; and (5) for common law fraud. Federal jurisdication is founded upon §22(2) of the 1933 Securities Act, §27 of the 1934 Securities Act, and diversity of citizenship, 28 U.S.C. §1332.

The defendant moves to abate the instant proceedings, giving preference to a now pending state court action in the Circuit Court of Cook County, Illinois, involving the same parties and the same general issues, or, in the alternative, to dismiss on the ground that the reinsurance agreement does not constitute a security under the federal securities acts. We do not

reach the securities question at this time, but, for the reasons set forth hereinafter, we will stay those aspects of the instant suit which are concurrently before both courts.

FACTS

Calvert is a Pennsylvania corporation engaged in the writing of property and casualty insurance. Amerco is an Illinois corporation engaged solely in the business of reinsurance. In order to expand its reserves, thereby increasing the volume of its business, Amerco has since 1947 organized, sponsored, and administered a reinsurance pool known as the Multiple Line Pool. The approximately 100 insurance companies which participate in this pool stand to benefit by receiving an agreed percentage of the excess premiums earned over losses paid to primary insureds, less management fees. Conversely, in the event that the losses exceed premiums less management fees, the participants are obligated to indemnify Amerco. This process of profit and loss sharing is referred to in insurance parlance as the quota share method of retrocession.

In the spring of 1973, an executive of Amerco contacted Calvert soliciting its participation in the pool. Thereafter, negotiations took place between the parties culminating in early 1974 with the execution by Calvert of a Multiple Line Reinsurance Agreement. Calvert contends that, during the negotiation period, it continually sought statistics regarding Amerco's performance during 1973 but this information was never forthcoming. Calvert further claims that Amerco never suggested that it was experiencing economic difficulties or that it anticipated changing its accounting methods or method of reserving for losses.

Late in March of 1974, Calvert received its first statement from Amerco concerning Calvert's share in the premiums and losses reflecting extremely high reserves for incurred but not reported losses for the period January-February 1974. Immediately thereafter, in April 1974, Calvert received Amerco's 1973

Annual Report which indicated an inordinately high loss and expense ratio. Greatly surprised by the pool's substantial losses for which it now found itself pro rata accountable, Calvert concluded after inquiry that it had been fraudulently induced to participate in the pool by reason of Amerco's failure or refusal to disclose information known to it prior to the execution of the agreement. Claiming that it would not have entered the agreement had it known the true financial condition of the pool or of Amerco's decision to alter its methods of accounting or its reserves, Calvert notified Amerco on April 19, 1974 that it had elected to rescind its participation in the pool.

In response, Amerco filed suit in the Circuit Court of Cook County on July 3, 1974, seeking declaratory relief finding the pool agreement to be in full force and effect, and ordering Calvert to participate in the losses for calendar year 1974, in accordance with the terms of the agreement. On January 10, 1975, Calvert filed its answer and counterclaim in the state court action and, on the same date, filed the instant suit here. Included in Calvert's state court responsive pleading are a number of "affirmative defenses" seeking rescission of the pool agreement under (1) the 1933 Securities Act; (2) the 1934 Securities Exchange Act; (3) the Illinois Securities Law; (4) the Maryland Security Act; and (5) common law fraud. Calvert's state court counterclaim, which seeks monetary damages in the amount of $2,000,000, asserts all of these same grounds with the exception of the 1934 Act. The action before us seeks rescission or, in the alternative, monetary damages upon all five grounds enumerated above. The only substantive difference between Calvert's responsive pleadings in the state court and its complaint in this suit is the absence of a 1934 Act claim for money damages in Calvert's state court counterclaim.

MOTION TO ABATE

On February 5, 1975, Amerco filed its motion to abate the proceedings before this court. In support of its motion, Amerco

relies principally upon the Seventh Circuit Court of Appeals decision in *Aetna State Bank* v. *Altheimer,* 430 F.2d 750 (1970), wherein the court found that the trial court did not abuse its discretion by staying proceedings pending disposition of a state court action between the same parties and embracing the same issues. In reaching its decision, the Seventh Circuit stressed the salutary principle that courts are vested with the power to control the disposition of cases on their dockets with economy of time and effort for themselves, for counsel, and for litigants. Thus, while a federal court is not required to stay a case pending the outcome of an identical state court action, sound principles of judicial administration may warrant the court exercising its discretion in appropriate circumstances to avoid unnecessary duplication of judicial effort, possible conflicting results, or the perplexing questions of *res judicata. Aetna, supra,* at 755, 758. So long as the state court has jurisdiction, and the stay is not foreclosing a litigant from the preemptive jurisdiction of the federal courts, confining issues before a single forum has been recognized as an acceptable method for dealing with burdensome and repetitious litigation which places an added burden on the burgeoning dockets of both state and federal courts.

In its discussion of those factors which should be taken into account when determining whether, on balance, a stay is warranted, the Seventh Circuit discounted the notion that the priority of initiation was the controlling factor. Although worthy of some significance, the court stressed that "the doctrine of abstention should have greater flexibility than would be indicated by blind and routine adherence of the matter of priority of litigation." *Aetna, supra* at 758. Other factors which the court felt should be considered included, "the totality of the issues before the respective courts, the convenience of the parties, the prospect of early completion of the litigation, and any other aspects which might bear upon the fairness of litigation to all concerned." *Aetna, supra* at 758.

Applying these general guidelines to the factors present here, we find that, in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative. The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the 1934 Act monetary damages question, but it also includes those issues underlying Amerco's declaratory judgment action which are not present here. Accepting the fact that the state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna,* we find that Calvert's federal suit should be stayed pending disposition of the state court suit.

In opposition to Amerco's motion to abate, Calvert has offered three separate arguments, none of which we find to be persuasive. Essentially, Calvert contends:

1. This court's jurisdiction has been invoked under Section 27 of the 1934 Act which is a grant of *exclusive* jurisdiction to federal courts;

2. Abstention is not appropriate since the paramount issues in the instant suit arise under federal not state law;

3. Amerco has manifested a clear preference for an adjudication of the issues raised by its motion before this Court.

The same argument regarding the exclusivity of a 1934 Act claim was disposed of in *Aenta,* where, as here, 10b-5 was raised as an affirmative defense. The court stated at p. 754:

> The Bank strenuously contends that abatement of the action was impermissible because Congress has granted to the federal courts exclusive jurisdiction over violations of the Securities Exchange Act. We concede the correctness of this position in so far as the initiation of an action founded on the federal statute in question. However, the matter can be litigated in the state court action involving these parties. The original brief filed by the Bank quotes Professor Loss to the effect that even if it be assumed that the act precludes a state court from entertaining an action in so far as relief is sought, "nothing in that section prevents the state court from considering questions * * * which are introduced by way of defense, and failure to do so would violate the supremacy clause." II Loss, Securities Regulation 977 (1961).
>
> Professor Loss points out that the Supreme Court of Delaware had reached the opposite position. However, the author feels on the basis of a number of analogous situations that there is no question that the refusal of a state court to entertain a defense of federal illegality is a graver error than its refusing to accept jurisdiction which is given it over federal claims.

The Seventh Circuit's interpretation of the 1934 Act has been followed with approval by other courts which have held that the situation wherein the state possesses concurrent jurisdiction to entertain defenses arising under the 1934 Act is neither unique nor offensive to the traditional notions of federalism, preemption, or supremacy. *Hampton House Management Corp.*

v. *Saleh,* 357 F.Supp. 591 (S.D.N.Y. 1973). Accord, *Shareholders Management Co.* v. *Gregory,* 449 F.2d 326 (9th Cir. 1971).

Notwithstanding, the plaintiff, relying principally upon *Movielab, Inc.* v. *Berkey Photo, Inc.,* 321 F.Supp. 806 (S.D.N.Y. 1970), urges that the state court does not have jurisdiction over the 1934 Act claim. If Calvert had raised a claim for money damages in its counterclaim, we would agree that would be in the nature of a cause of action originating under the 1934 Act and therefore subject to the exclusive jurisdiction of the federal court.[1] Calvert, however, has conspicuously omitted the 1934 Act from its state court counterclaim. The only reference to the 1934 Act is in Calvert's affirmative defenses seeking rescission of the agreement. Such relief, in response to a declaratory action seeking enforcement of the agreement, is clearly in the nature of a defense; it does not seek to affirmatively recover anything from the plaintiff, it is merely a means of escaping liability under the contract. So characterized, Calvert's affirmative defense comes within the scope of *Aenta,* and, therefore, the state court has concurrent jurisdiction to adjudicate the 1934 Act claim raised by way of defense.

Calvert further argues that, since *Aenta* involved "repetitive litigation" filed by the same party as the plaintiff in each court, while here the defendant-counterclaimant in the state suit is the plaintiff in this court, *Aenta* is distinguishable. Calvert's contention was rejected by the Ninth Circuit in *Shareholders Management Co.* v. *Gregory, supra* at 327, where the court found *Aenta* to be applicable to "reactive litigation" as well. In *Gregory,* the plaintiffs in the federal action sought declaratory relief adjudicating a federal defense to an action filed against them in a California state court. The court, relying on *Aenta*

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[1] For a thorough examination of the state court's lack of subject matter jurisdiction over 10b-5 counterclaims, see Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place For a Private Right,* 68 Nw. U.L. Rev. 44, 65 (1973).

found "no jurisdictional barrier to the state court's entertaining and adjudicating the merits of appellants' defense based on the interpretation of the Securities Exchange Act of 1934."

Regardless of its litigating posture in these two cases, Calvert is responsible for raising substantially the same claims in both courts. As would be the case if this were repetitive litigation, the same elements of duplication of effort and extra burden to the courts are present. As Professor Vestal concluded in his scholarly work dealing with reactive litigation, the press of litigation facing the courts highlights the need to curtail or eliminate unnecessary reactive litigation, not only to conserve judicial manpower but also to avoid the unseemly race to judgment with its concomitant harrassment and confusion. Vestal, *Reactive Litigation,* 47 Iowa L. Rev. 11 at 28 (1961). Accepting reactive litigation as merely another form of duplicative litigation imposing similar burdens upon the courts and litigants, we find the positioning of Calvert as defendant-counterclaimant in the state suit and plaintiff here to be of little consequence, and not to preclude our exercise of discretion permitting the state court to adjudicate the 1934 Act defense.

Nor are we persuaded by Calvert's suggestion that we should assume jurisdiction because the paramount issues are federal in nature. While we agree that, all things being equal, federal courts are the preferred forum for considering securities questions arising under federal law, the Seventh Circuit in *Aenta* stressed a corresponding need for judicial economy. Since this is a question of discretion and not jurisdiction, we find, as in *Aenta* that confining all of the issues before the state court is preferable to simultaneous consideration by both courts of all issues, both state and federal.

Finally, we find little merit in Calvert's suggestion that, because Amerco chose to brief the securities question as an alternative to its motion to abate, it opted for the federal court to decide that issue. We do not read anything more into Amerco's motions than presenting an alternative contingency

argument in the event it did not prevail on the abatement question. Amerco's reply brief expressly states that we need not reach the question of whether the agreement constituted a security if its motion to abate is granted.

While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here.

To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts. This leaves only Calvert's very limited claim for monetary damages under the 1934 Securities Act as a viable claim in this court. An order consistent with the foregoing will enter.

.....

United States District Judge

Dated: May 6, 1975

B1-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Hubert L. Will

Cause No. 75c103 Date May 6, 1975

Title of Cause *Calvert Fire Ins. Co.* v. *American Mutual Reinsurance Corp.*

Brief Statement of Motion .....

.....

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

.....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent .....

.....

.....

.....

Reserve space below for notations by minute clerk

Pursuant to Court's memorandum opinion this day filed; order all aspects of Calvert's federal action which are pending before both courts are stayed. This leaves only Calvert's very limited claim for monetary damages under the 1934 Securities Act as a viable claim in this court.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX 3

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool,

Plaintiff,

No.

-vs-

EXTRAORDINARY REMEDY

CALVERT FIRE INSURANCE COMPANY,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Now comes the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, sometimes referred to herein as AMRECO, Individually, and for the use of ALL AMERICAN INSURANCE COMPANY, ALLENDALE MUTUAL INSURANCE COMPANY, ALL-STAR INSURANCE COMPANY, AMBASSADOR INSURANCE COMPANY, AMERICAN CONTINENTAL INSURANCE COMPANY, AMERICAN HARDWARE MUTUAL INSURANCE COMPANY,

AMERICAN HOME ASSURANCE COMPANY, AMERICAN MUTUAL FIRE INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, THE AMERICAN STAR INSURANCE COMPANY, ARGONAUT INSURANCE COMPANY, ASSOCIATED MUTUAL INSURANCE COMPANY, AUDUBON INSURANCE COMPANY, AUSTIN MUTUAL INSURANCE COMPANY, BENEFICIAL FINANCIAL INSURANCE COMPANY, CAMERON MUTUAL INSURANCE COMPANY, THE CAPITAL FIRE INSURANCE COMPANY, CASUALTY RECIPROCAL EXCHANGE, CENTRAL MUTUAL INSURANCE COMPANY, CITIZENS MUTUAL INSURANCE COMPANY, CITIZENS SECURITY MUTUAL INSURANCE COMPANY, CLEARFIELD INSURANCE LIMITED, THE COLLEGE/UNIVERSITY INSURANCE COMPANY, COLUMBIA MUTUAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, CONSOLIDATED MUTUAL INSURANCE COMPANY, COTTON STATES MUTUAL INSURANCE COMPANY, DRUGGISTS MUTUAL INSURANCE COMPANY, ELITE INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INS. CO. OF WISCONSIN, EXCHANGE MUTUAL INSURANCE COMPANY, FARMERS HOME MUTUAL INSURANCE COMPANY, FARMERS MUTUAL HAIL INS. CO. OF COLUMBIA, MO., FEDERATED MUTUAL INSURANCE COMPANY, FINANCIAL FIRE & CASUALTY COMPANY, FREMONT MUTUAL INSURANCE COMPANY, GENERAL FIRE & CASUALTY COMPANY, GRINNEL MUTUAL REINSURANCE CORPORATION, THE HAMILTON MUTUAL INSURANCE CO. OF CINCINNATI, HARFORD MUTUAL INSURANCE COMPANY, THE HARTFORD STEAM BOILER INSPECTION & INS. CO., HAWAIIAN INSURANCE & GUARANTY CO., LTD., HINGHAM MUTUAL FIRE INSURANCE COMPANY, INDEPENDENT FIRE INSURANCE COMPANY, INTEGRITY INSURANCE COMPANY, INTEGRITY MUTUAL INSURANCE

COMPANY, INTERBORO MUTUAL INDEMNITY INSURANCE COMPANY, INTERSTATE INSURANCE COMPANY, IOWA MUTUAL INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, MANCHESTER INSURANCE & INDEMNITY COMPANY, MANUFACTURERS & MERCHANTS MUTUAL INS. CO., MERCHANTS MUTUAL INSURANCE COMPANY, MERRIMACK MUTUAL FIRE INSURANCE COMPANY, MFA MUTUAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, MIDDLESEX MUTUAL ASSURANCE COMPANY, MIDDLESEX MUTUAL INSURANCE COMPANY, MIDLAND INSURANCE COMPANY, MIDLAND UNION INSURANCE COMPANY, MILBANK MUTUAL INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INS. CO. OF TEXAS, THE MONARCH INSURANCE COMPANY OF OHIO, MORRISON ASSURANCE COMPANY, INC., THE MUTUAL FIRE, MARINE & INLAND INSURANCE CO., NEW HAMPSHIRE INSURANCE COMPANY, NORTH EAST INSURANCE COMPANY, OLD GUARD MUTUAL INSURANCE COMPANY, OLD RELIABLE FIRE INSURANCE COMPANY, OREGON MUTUAL INSURANCE COMPANY, PENNSYLVANIA MANUFACTURERS ASSOC. INS. CO., PENNSYLVANIA MILLERS MUTUAI INSURANCE COMPANY, PHILADELPHIA MANUFACTURERS MUTUAL INS. CO., PROTECTION MUTUAL INSURANCE COMPANY, THE PROVIDENCE MUTUAL FIRE INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INSURANCE COMPANY, RURAL MUTUAL INSURANCE COMPANY, SASKATCHEWAN GOVERNMENT INSURANCE OFFICE, SECURITY INSURANCE COMPANY OF HARTFORD, THE SHELBY MUTUAL INSURANCE CO. OF SHELBY, OHIO, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY, STONEWALL INSURANCE

COMPANY, THE SUSSEX MUTUAL INSURANCE COMPANY, THOMAS JEFFERSON INSURANCE COMPANY, TRANSNATIONAL INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNION INSURANCE COMPANY, UNITED AMERICA INSURORS, UNITED FARM BUREAU MUTUAL INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, UTICA MUTUAL INSURANCE COMPANY, WEST BEND MUTUAL INSURANCE COMPANY, WESTERN NATIONAL MUTUAL INSURANCE COMPANY, WILSHIRE INSURANCE COMPANY, WISCONSIN FARMERS MUTUAL INSURANCE COMPANY, YOSEMITE INSURANCE COMPANY, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and complaining of the defendant, CALVERT FIRE INSURANCE COMPANY, states onto the Court as follows:

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and at all times mentioned herein, was in the business of reinsuring property and casualty risks and organizing and managing a reinsurance pool consisting of property and casualty insurance companies herein above identified.

2. Defendant, CALVERT FIRE INSURANCE COMPANY, is a corporation licensed to do business by virtue of the laws of the State of Illinois, and at all times mentioned herein, was in the business of writing property and casualty insurance and participating in various reinsurance pools and arrangements.

3. Pursuant to plaintiff's business as a reinsurer of risks, numerous property and casualty insurance companies offer portions of risks from property and casualty insurance policies to plaintiff.

4. The aforesaid insurance companies thereby take advantage of the initial benefits of plaintiff's reinsurance

program by reinsuring portions of insurance policies with plaintiff, and, as consideration therefore, plaintiff is paid a portion of the premium charged for such policies.

5. In return for the possibility of realizing an underwriting profit, plaintiff reinsures and accepts the aforesaid portions of risks and premiums which were originally accepted by the property and casualty insurance companies through sales of insurance policies.

6. Plaintiff's acceptance of portions of risks from the original vendors of property and casualty insurance policies is by written reinsurance contract, committing plaintiff to share in their losses which occur while such reinsurance contracts are in force.

7. As a form of risk-assuming activity in the hope of profit, various property and casualty insurance companies participate in plaintiff's reinsurance pool.

8. The aforesaid participants share in plaintiff's reinsurance pool by accepting portions of the risks and premiums assumed by plaintiff under its reinsurance contract.

9. Pursuant to the aforesaid arrangement, defendant, CALVERT FIRE INSURANCE COMPANY, a corporation, entered into a written agreement with the plaintiff, a copy of said agreement being attached hereto and incorporated herein as plaintiff's Exhibit "A".

10. The duration of the aforesaid agreement is found in Paragraph Ten thereof;

"TERM

This agreement shall apply to all contracts written or renewed by the company to become effective on or after January 1, 1974, and shall remain in force continuously until terminated at the close of any December 31, by either party giving to the other six months' prior notice in writing.

However, in the event of such termination the Participant shall remain liable hereunder for its share of losses and expenses resulting from losses or occurrences which happen prior to such termination."

11. On April 22, 1974, defendant requested termination of the aforesaid agreement pursuant to letter and telegram, copies of said documents being attached hereto and incorporated herein as plaintiff's Exhibit "B" and "C", respectively.

12. Plaintiff has agreed to terminate the aforesaid agreement at its earliest possible termination date, December 31, 1974, and has repeatedly requested that defendant honor the contractual obligations assumed by the defendant for the period from January 1, 1974, through December 31, 1974, pursuant to letters, copies of which are attached hereto and incorporated herein as plaintiff's Exhibits "D" and "E", respectively.

13. Defendant contends it is not bound by any portion of the aforesaid agreement by reason of its telegram, Exhibit "C", requesting retro-active termination and for other reasons unknown to plaintiff.

14. Plaintiff contends defendant is bound by the aforesaid agreement for the minimum participation period provided, i.e. January 1, 1974, through December 31, 1974, and that defendant must participate in premiums and losses attributable to the aforesaid period.

15. An actual controversy exists between the plaintiff and the defendant, and by the terms and provisions of Section 57.1 of the Civil Practice Act of the State of Illinois, this Court is invested with the power to declare the rights and liabilities of the parties hereto, and to give such other further relief as may be necessary in the premises.

WHEREFORE, the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, prays:

1. That this Court determine and adjudicate the rights and liabilities of the parties hereto with respect to the reinsurance participating agreement herein above described and attached as plaintiff's Exhibit "A".

2. That this Court find and declare that the aforesaid agreement entered into between plaintiff and defendant is in full force and effect between the parties, and that the defendant is obligated to participate in premiums and losses as set forth in the agreement between the plaintiff and the defendant attributable to the period of January 1, 1974, through December 31, 1974.

3. That this Court grant such other and further relief as it deems fit and proper under the evidence and circumstances.

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER

By: _____
Attorneys for the Plaintiff

69 West Washington Street—Suite 2700
Chicago, Illinois 60602
630-4400

APPENDIX 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMERICAN MUTUAL REINSURANCE COMPANY, individually and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool,

Plaintiff,

No. 74 L 10737
EXTRAORDINARY
REMEDY

vs.

CALVERT FIRE INSURANCE COMPANY,

Defendant.

ANSWER AND COUNTERCLAIM

Now comes the defendant, CALVERT FIRE INSURANCE COMPANY ("Calvert"), by its attorney, Michael L.

Weissman of Aaron, Aaron, Schimberg & Hess, and as and for its answer to the Complaint for Declaratory Judgment ("Complaint") filed herein by AMERICAN MUTUAL REINSURANCE COMPANY ("AMRECO"), individually and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, states as follows:

1. Calvert admits that AMRECO is in the business of reinsuring property and casualty risks and organizing and managing a reinsurance pool consisting of property and casualty insurance companies but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 1 of the Complaint.

2. Calvert admits the allegations set forth in Paragraph 2 of the Complaint.

3. Calvert admits the allegations set forth in Paragraph 3 of the Complaint.

4. Calvert is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Complaint.

5. Calvert admits the allegations set forth in Paragraph 5 of the Complaint.

6. Calvert is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 6 of the Complaint.

7. Calvert admits the allegations set forth in Paragraph 7 of the Complaint.

8. Calvert admits the allegations set forth in Paragraph 8 of the Complaint.

9. Calvert admits that it executed the written agreement attached to AMRECO's Complaint as Exhibit "A" but, answering further, Calvert states that it was induced to

execute said written agreement by reason of material misrepresentations of fact and the failure to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading thus rendering the said agreement void *ab initio*.

10. Calvert admits that Paragraph Ten of the written agreement described in Paragraph 9 of the Complaint (hereinafter referred to as the "reinsurance participation agreement") contains the provisions set forth in Paragraph 10 of the Complaint but denies the remaining allegations set forth in Paragraph 10 of the Complaint.

11. Calvert admits the allegations set forth in Paragraph 11 of the Complaint.

12. Calvert admits that AMRECO has refused to terminate the reinsurance participation agreement as of January 1, 1974 but denies all of the remaining allegations set forth in Paragraph 12 of the Complaint.

13. Calvert admits the allegations set forth in Paragraph 13 of the Complaint.

14. Calvert admits that AMRECO contends that Calvert is bound by the reinsurance participation agreement through December 31, 1974 but denies all of the remaining allegations set forth in Paragraph 14 of the Complaint.

15. Calvert admits that a controversy exists between it and AMRECO but denies all of the remaining allegations set forth in Paragraph 15 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool which AMRECO offered and sold to Calvert on or about January 11, 1974 and which AMRECO offered and sold to more than 90 other insurance companies, constituted an

offer and sale to the public of a security within the meaning of Section 2(1) and 5 of the Securities Act of 1933, as amended (the "1933 Act").

2. Said security was not registered in violation of the registration requirements of Section 5 of the 1933 Act.

3. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

4. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security. Said notice is attached hereto as Exhibit "A" and made a part herof.

5. AMRECO has refused to accept the foregoing tender.

6. The failure of AMRECO to register said security entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

SECOND AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert by AMRECO constituted the offer and sale of a security within the meaning of Section 3(a)(10) of the Securities and Exchange Act of 1934, as amended (the "1934 Act").

2. In connection with the offer and sale of said security to Calvert, AMRECO, by the use of the mails and other means and instrumentalities of interstate commerce, has (1) employed devices, schemes and artifices to defraud; (2) made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the

circumstances under which they were made, not misleading; and (3) engaged in acts, practices and a course of business which have operated as a fraud and deceit upon Calvert in violation of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder.

3. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

4. AMRECO has refused to accept the foregoing tender.

5. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has suffered substantial injury and is entitled to rescission of its purchase of the aforesaid security.

THIRD AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-½,§137-2.1, and Rule 130 promulgated thereunder.

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law.

3-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 and 4 of its Second Affirmative Defense as Paragraphs 3 and 4 of its Third Affirmative Defense as though set forth fully herein.

5. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

6. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescission of its purchase of the aforesaid security.

FOURTH AFFIRMATIVE DEFENSE

1. The participatory interest in the 1974 Multiple Line Pool offered and sold to Calvert on January 11, 1974 by AMRECO constitutes the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act, as more fully described hereinafter.

3. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

FIFTH AFFIRMATIVE DEFENSE

1. In order to induce Calvert to enter into reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, made material misrepresentations of fact to Calvert concerning the 1974 AMRECO Multiple Line Pool.

2. In reliance on AMRECO's material misrepresentations of fact, Calvert executed the reinsurance participation agreement on or about January 11, 1974.

3. Had Calvert known that the foregoing representations were false, it would not have signed said reinsurance participation agreement.

4. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

SIXTH AFFIRMATIVE DEFENSE

1. By the pleadings filed in this cause, AMRECO purports to act as agent for the members of the unincorporated association known as the 1974 AMRECO Multiple Line Pool.

2. The only agreements executed by the members of the 1974 AMRECO Multiple Line Pool were identical to the agreement annexed to AMRECO's Complaint as Exhibit "A" and said agreement does not confer authority upon AMRECO to maintain any suit or proceeding on behalf of the members of the 1974 AMRECO Multiple Line Pool.

3. Since AMRECO is without authority to institute this action, its Complaint must be stricken and this action dismissed.

SEVENTH AFFIRMATIVE DEFENSE

AMRECO participated in and managed the 1974 AMRECO Multiple Line Pool without obtaining the approval of the Illinois Department of Insurance in violation of 73 Ill. Rev. Stat. §786.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter judgment in its favor against AMERICAN MUTUAL REINSURANCE COMPANY and that costs be taxed to AMERICAN MUTUAL REINSURANCE COMPANY.

COUNTERCLAIM

As and for its Counterclaim to the said Complaint for Declaratory Judgment, Calvert states as follows:

COUNT ONE

1. The participatory interest in the 1974 AMRECO Multiple Line Pool which AMRECO offered and sold to Calvert on or about January 11, 1974 and which AMRECO offered and sold to more than 90 other insurance companies, constituted an offer and sale to the public of a security within the meaning of Sections 2(1) and 5 of the Securities Act of 1933, as amended (the "1933 Act").

2. Said security was not registered in violation of the registration requirements of Section 5 of the 1933 Act.

3. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

4. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

5. AMRECO has refused to accept the foregoing tender.

6. The failure of AMRECO to register said security entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT TWO

1. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-1/2, §137-2.1, and Rule 130 promulgated thereunder.

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law.

3. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security.

4. AMRECO has refused to accept the foregoing tender.

5. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

6. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescission of its purchase of the aforesaid security.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT THREE

1. The participatory interest in the 1974 Multiple Line Pool offered and sold to Calvert on January 11, 1974 by AMRECO constitutes the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

2. In connection with the offer and sale of said security to Calvert, AMRECO has made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act.

3. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT FOUR

1. In order to induce Calvert to enter into the reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, made material misrepresentations of fact to Calvert concerning the 1974 AMRECO Multiple Line Pool.

2. In reliance on AMRECO's material misrepresentations of fact, Calvert executed the reinsurance participation agreement on or about January 11, 1974.

3. Had Calvert known that the foregoing representations were false, it would not have signed said reinsurance participation agreement.

4. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

WHEREFORE, defendant CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

CALVERT FIRE INSURANCE COMPANY

By_____
Its Attorney

Michael L. Weissman
Aaron, Aaron, Schimberg & Hess
One First National Plaza
Chicago, Illinois 60603
(312) 236-8552

EXHIBIT "A"

CALVERT FIRE INSURANCE COMPANY
300 St. Paul Place
Baltimore, Maryland 21202

January 9, 1975

American Mutual Reinsurance Company,
individually and as agent for the
property and casualty insurance
companies which are participants
in the 1974 AMRECO Multiple Line
Pool,
One East Wacker Drive
Chicago, Illinois 60601

Attention: Mr. Wallace E. Winter, President

NOTICE OF RESCISSION

Gentlemen:

Pursuant to the applicable provisions of the Securities Act of 1933, as amended, the Securities Exchange Act of 1934, as amended, and the Illinois Securities Act of 1953, the undersigned corporation hereby elects to rescind the purchase of the security which it made from you on January 11, 1974 effective as of January 1, 1974 as per our telegram to you dated April 19, 1974 and our letter to you dated April 22, 1974. We tender to you herewith any interest which we acquired in the security, i.e., our participation in the 1974 AMRECO Multiple Line Pool.

The exercise of the right of rescission is without prejudice to any claim for damages we have under common law or federal or state securities laws.

Yours very truly,

CALVERT FIRE INSURANCE COMPANY

By: _____

Its Attorney

RECEIPT ACKNOWLEDGED:
this 9th day of January, 1975.

AMERICAN MUTUAL
REINSURANCE COMPANY

By: _____

Appendix 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CALVERT FIRE INSURANCE COMPANY,
a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE
COMPANY, an Illinois corporation,
Defendants.

COMPLAINT

Now comes the plaintiff, CALVERT FIRE INSURANCE COMPANY ("Calvert"), by its attorneys, Michael L. Weissman, Dean A. Dickie and Mary K. Krigbaum, and complaining of the defendant, AMERICAN MUTUAL REINSURANCE COMPANY ("AMRECO") states as follows:

COUNT I

JURISDICTION

1. The jurisdiction of the Court is based on Section 22(a) of the Securities Act of 1933, as amended ("1933 Act") and Section 27 of the Securities Exchange Act of 1934, as amended ("1934 Act").

2. The claims alleged herein arise under the 1933 Act and the 1934 Act, particularly Section 12(1) of the 1933 Act, Section 10(b) of the 1934 Act, and the rules and regulations promulgated thereunder, particularly Rule 10b-5 thereof.

3. Calvert is a corporation incorporated under the laws of the State of Pennsylvania and has its principal office in the State of Maryland. AMRECO is a corporation incorporated under the laws of the State of Illinois and has its principal office in the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00) and this Court has jurisdiction of this matter under 28 U.S.C. 1332 (a)(1).

4. At all times mentioned herein, Calvert was and is in the business of writing property and casualty insurance. At all times mentioned herein, AMRECO was and is in the business of managing reinsurance pools.

5. AMRECO solicits the participation of other property and casualty insurance companies who will agree to accept portions of the risks and premiums of the reinsurance pools organized and managed by AMRECO.

6. Various property and casualty insurance companies participated in AMRECO's 1974 Multiple Line Pool with the expectation of deriving a profit from the organizational and managerial efforts of AMRECO.

7. Calvert executed a written agreement to participate in the 1974 AMRECO Multiple Line Pool with AMRECO on or about January 11, 1974, a copy of which is attached hereto as Exhibit "A" (hereinafter sometimes referred to as the "reinsurance participation agreement"). Calvert was induced to execute said agreement by reason of material misrepresentations of fact and by the failure of AMRECO to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

8. AMRECO's offer and sale of participatory interests in the 1974 AMRECO Multiple Line Pool to Calvert and at least 99 other insurance companies located in diverse parts of the

United States constituted an offer and sale to the public of a security within the meaning of Sections 2(1) and 5 of the 1933 Act.

9. Said security was not registered prior to its being offered and sold in violation of the registration requirements of Section 5 of the 1933 Act.

10. At no time were the offerees and purchasers of said security provided with information equivalent to that which would have been available to them had a prospectus in accordance with Section 5 of the 1933 Act been prepared and delivered to them at the time of the offer and sale.

11. On January 9, 1975, Calvert delivered a notice of rescission to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any and all interest it had acquired in the aforesaid security. Said notice is attached hereto as Exhibit "B" and made a part hereof.

12. AMRECO has refused to accept the foregoing tender.

13. The failure of AMRECO to register said security prior its being offered and sold entitles Calvert to rescission pursuant to Section 12(1) of the 1933 Act.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void and that this Court grant such other relief as it shall deem equitable and appropriate.

COUNT II

1-7. Calvert hereby realleges and incorporates by reference Paragraphs 1 through 7 of Count I of this Complaint as Paragraphs 1 through 7 of Count II of this Complaint as though set forth fully herein.

8. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert by AMRECO constituted the offer and sale of a security within the meaning of Section 3(a)(10) of the Securities and Exchange Act of 1934, as amended (the "1934 Act").

9. In connection with the offer and sale of said security to Calvert, AMRECO, by the use of the mails and other means and instrumentalities of interstate commerce, has (1) employed devices, schemes and artifices to defraud; (2) made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (3) engaged in acts, practices and a course of business which have operated as a fraud and deceit upon Calvert in violation of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, as more fully described hereinafter.

10. Negotiations between AMRECO and Calvert for the purchase and sale of said security began in the spring of 1973 and continued until the time the reinsurance participation agreement was signed on or about January 11, 1974.

11. In order to induce Calvert to purchase said security AMRECO, through its agents, including a certain Robert Morris, represented to Calvert, among other things, that its financial statements and experience figures for the years 1947 through 1972 were representative of their current financial status and experience figures and that said statements and figures could be used to evaluate the merits of a participatory interest in the 1974 AMRECO Multiple Line Pool.

12. In fact, AMRECO and its agents knew, or with the exercise of reasonable care and diligence should have known, that its past performance through 1972 could not be used as an accurate basis for evaluating the aforesaid security in view of a change in accounting policy and procedures made during 1973.

13. During the fourth quarter of 1973, reserve adjustments in the amount of approximately $11,000,000 were made by

AMRECO. As a result of said adjustments, AMRECO's performance prior to 1973 could not in fact be used as a true basis for evaluating the aforesaid security which AMRECO offered to Calvert.

14. As a result of said adjustments and other factors, unknown to Calvert, AMRECO's combined operating ratio increased from 92.3% in 1972 to 131% in 1973.

15. Although Calvert made repeated requests for the 1973 experience figures, financial statements and combined operating ratios prior to purchasing the security, AMRECO refused to divulge such information and failed to give any indication of the change in its accounting policy and procedures.

16. Calvert purchased the aforesaid security on or about January 11, 1974 in reliance on AMRECO's experience figures, financial statements and combined operating ratio for years prior to 1973, and without knowledge of the substantial reserve adjustment made by AMRECO in 1973.

17. The foregoing misrepresentations and omissions to state material facts were not discovered by Calvert until on or about April 15, 1974 when Calvert first received AMRECO's annual report for 1973. Calvert promptly terminated the reinsurance participation agreement effective as of January 1, 1974.

18. In addition, on January 9, 1975, Calvert delivered a notice of rescission of its purchase of the aforesaid security to AMRECO, both individually and as agent for the 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool and tendered any interest in the aforesaid security.

19. AMRECO has refused to accept the foregoing tender.

20. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has suffered substantial injury and is entitled to rescind its purchase of the aforesaid security.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY respectfully prays that this Court enter an order declaring that Calvert's purchase of the aforesaid security was null and void or, in the alternative, if this Court should find that Calvert is not entitled to rescission, Calvert prays that this Court award damages against the defendant AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT III

1-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 6 of Count I of this Complaint as Paragraphs 1 through 4 of Count III of this Complaint as though set forth fully herein.

5. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold by AMRECO to Calvert on or about January 11, 1974 constituted the offer and sale of a security within the meaning of Section 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill.Rev.Stat. ch. 121-1/2, §137-2.1, and Rule 130 promulgated thereunder.

6. In connection with the offer and sale of said security to Calvert, AMRECO made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 137.12(G) of the Illinois Securities Law, as more fully described hereinafter.

7-16. Calvert hereby realleges and incorporates by reference Paragraphs 10 through 19 of Count II of this Complaint as Paragraphs 7 through 16 of Count III of this Complaint as though set forth fully herein.

17. Notice of Calvert's election to rescind was given in compliance with Section 137.13(B) of the Illinois Securities Law.

18. As a result of the foregoing omissions and misrepresentations of material fact, Calvert is entitled to rescind its purchase of the aforesaid security.

WHEREFORE, Plaintiff CALVERT FIRE INSURANCE COMPANY prays that this Court enter an order declaring that Calvert's purchase of its participatory interest in the 1974 AMRECO Multiple Line Pool was and is null and void and that this Court grant such other and further relief as it shall deem equitable and appropriate.

COUNT IV

1-4. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 6 of Count I of this Complaint as Paragraphs 1 through 4 of Count IV of this Complaint as though set forth fully herein.

5. The participatory interest in the 1974 AMRECO Multiple Line Pool offered and sold to Calvert on or about January 11, 1974 by AMRECO constituted the offer and sale of a security within the meaning of Section 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. art. 32A, §26(a)(5).

6. In connection with the offer and sale of said security to Calvert, AMRECO made untrue statements of material fact and omitted to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 34(a)(2) of the Maryland Securities Act, as more fully described hereinafter.

7-13. Calvert hereby realleges and incorporates by reference Paragraphs 10 through 16 of Count I of this Complaint as Paragraphs 7 through 13 of Count IV of this Complaint as though set forth fully herein.

14. As a result of the foregoing omissions and misrepresentations of material fact, Calvert has been substantially injured and is entitled to damages pursuant to Section 34(a)(2) of the Maryland Securities Act.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

COUNT V

1-5. Calvert hereby realleges and incorporates by reference Paragraphs 3 through 7 of Count I of this Complaint as Paragraphs 1 through 5 of Count V of this Complaint as though set forth fully herein.

6. Negotiations between AMRECO and Calvert for the latter's participation in the 1974 AMRECO Multiple Line Pool began in the spring of 1973 and continued until the time the participation agreement was signed by the parties on or about January 11, 1974.

7. In order to induce Calvert to enter into said reinsurance participation agreement, AMRECO, through its agents, including one Robert Morris, represented to Calvert, among other things, that its financial statements and experience figures for the years 1947 through 1972 were representative of their current financial status and experience figures and that said statements and figures could be used to evaluate the merits of a participatory interest in the 1974 AMRECO Multiple Line Pool.

8. AMRECO and its agent knew or believed that AMRECO's performance through 1972 could not be used as an accurate basis for evaluating the aforesaid reinsurance participation interest in view of a change of accounting policy and procedures made during 1973.

9. During the fourth quarter of 1973, reserve adjustments in the amount of approximately $11,000,000 were made by AMRECO. As a result of said adjustments, AMRECO's performance prior to 1973 could not in fact be used as a true basis for evaluating a participatory interest in the 1974 AMRECO Multiple Line Pool.

10. As a result of said adjustments and other facts unknown to Calvert, AMRECO's combined operating ratio increased from 92.3% in 1972 to 131% in 1973.

11. Calvert executed the reinsurance participation agreement on or about January 11, 1974 in reliance on AMRECO's representations that its experience figures, financial statements and combined operating ratio for years prior to 1973 were representative of such figures for 1973 and 1974 and without knowledge of the falsity of such material representations of fact.

12. Had Calvert known that the foregoing representations were false, it would not have signed the said reinsurance participation agreement.

13. As a result of the foregoing material misrepresentations of fact, Calvert has been substantially injured.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY respectfully prays that this Court award damages against AMERICAN MUTUAL REINSURANCE COMPANY in the amount of Two Million Dollars ($2,000,000.00) and grant such other and further relief as this Court may deem equitable and appropriate.

CALVERT FIRE INSURANCE COMPANY

By .....
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